

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:10CR415 HEA
)	
JOVICA PETROVIC,)	
)	
Defendant,)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on the Memorandum and Recommendation of Magistrate Judge Terry I. Adelman that Defendant's Motion to Dismiss Counts I-IV, [Doc. No. 65], be denied. Defendant has filed written objections to the Report and Recommendation. When a party objects, as here, to the magistrate judge's report and recommendation, the Court must conduct a *de novo* review of the portions of the report, findings, or recommendations to which the party objected. See *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir.2003) (citing 28 U.S.C. § 636(b)(1)). Pursuant to 28 U.S.C. § 636, the Court will therefore conduct such a *de novo* review. The Court has reviewed the entire record and has listened to the audio recordings of the hearing held on February 4, 2011.

Defendant reiterates and reincorporates his previous bases set forth in his moving papers. In particular, Defendant argues that the speech involved herein is protected by the First Amendment. Judge Adelman's conclusion that Defendant's

speech is not protected by the First Amendment is based on Supreme Court opinions and thoroughly details the rationale for the conclusion. Although Defendant argues that his speech is protected, Defendant completely fails to distinguish his speech from the types of speech found by the Supreme Court to be unprotected. Defendant's position appears to be that his speech is protected merely by the fact that it is speech, even though it may be reprehensible speech. That is, the mere fact that the words were spoken automatically entitle them to protection under the First Amendment. The Court agrees with Judge Adelman that the speech at issue herein is not entitled to protection.

From Defendant's position that his speech was protected speech, Defendant argues that Judge Adelman failed to apply the O'Brien factors. *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court set out four factors which must be analyzed to determine if a law is "sufficiently justified." Under *O'Brien*, a law is "sufficiently justified" if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. *Id.*, at 377.

As the Government correctly argues, assessing the law under *O'Brien* is

only applicable *if* the speech is protected speech. Because the speech is not entitled to First Amendment protection, *O'Brien* analysis is not required.

Judge Adelman's Memorandum and Recommendation contains a very thorough analysis of the evidence presented at the hearings and the applicable law. Having conducted a *de novo* review of those portions of the Memorandum and Recommendation to which Defendant objects, the Court finds that Defendant's objections are without merit and will therefore be denied. The Court will adopt the Memorandum and Recommendation in its entirety.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Counts I-IV, [Doc. 65], is **DENIED**.

Dated this 2nd day of September, 2011.

A handwritten signature in dark ink, appearing to read "Henry Edward Autrey", written over a horizontal line.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE